

BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
DR 26/UC 600

THE NORTHWEST PUBLIC  
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

**THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL'S  
REPLY TO QWEST'S RESPONSE TO NPCC'S MOTION  
FOR SUMMARY JUDGMENT AND NPCC'S RESPONSE  
TO QWEST'S MOTION FOR SUMMARY JUDGMENT**

January 25, 2005

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## **GLOSSARY**

AFOR	Alternative form of regulation
DAC	Dial-around compensation
FCC	Federal Communications Commission
IXC	Interexchange carrier (long distance company)
KPSC	Kentucky Public Service Commission
LEC	Local exchange company
LPSC	Louisiana Public Service Commission
MPSC	Michigan Public Service Commission
NPCC	Northwest Public Communications Council (f/k/a NWPA for Northwest Payphone Association)
NST	New services test
OPUC	Oregon Public Utility Commission (also PUC for Public Utility Commission)
PAL	Public access line
PPUC	Pennsylvania Public Utility Commission
PSP	Payphone service provider
RBOC	Regional Bell Operating Company
SCPSC	South Carolina Public Service Commission
TRA	Tennessee Regulatory Authority
WUTC	Washington Utilities and Transportation Commission

## INTRODUCTION

The arguments in Qwest's Memorandum<sup>1</sup> that Qwest does not owe refunds to members of the Northwest Public Communications Council ("NPCC") once again beckon the OPUC to disregard and misapply Federal law. The OPUC was misled by Qwest's sophistry before, in Docket UT 80/UT 125. The result was that Oregon Court of Appeals overturned and remanded the OPUC's final order in that case because the OPUC failed to apply the FCC's *Payphone Orders*<sup>2</sup> correctly. *Northwest Public Comm's Council v. PUC*, 196 Or. App. 94, 100 P.3d 776 (2004).

Although Qwest does not dispute any fact that is material to NPCC's motion, Qwest's misapplication of Federal law leads Qwest to an erroneous conclusion. Based on the undisputed facts, the OPUC can reach only one conclusion: As a matter of law Qwest "relied" on the waiver granted in the FCC's *Refund Order*<sup>3</sup> by collecting dial around compensation ("DAC") beginning on April 15, 1997 without having Public Access Line ("PAL") tariffs in effect by April 15, 1997 that complied with the FCC's New Services Test ("NST"). As a matter of law, Qwest was not permitted to collect DAC on April 15, 1997, because Qwest's PAL tariffs on file on and after that date did not comply with the NST. Thus, federal law requires either that Qwest disgorge the DAC it collected or refund its PAL overcharges. If the OPUC upholds

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<sup>1</sup> "Qwest's Memorandum In Opposition to NPCC's Motion for Partial Summary Judgment and In Support of Qwest's Cross Motion for Summary Judgment."

<sup>2</sup> *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶ 146-147 (1996) ("*First Payphone Order*"), and Order on Reconsideration, 11 FCC Rcd. 21233, ¶¶ 131, 163 (1996) ("*Reconsideration Order*") *aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("*Waiver Order*"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("*Refund Order*") (collectively "*Payphone Orders*").

<sup>3</sup> Note 2, *supra* (also referred to as the "*April 15, 1997 Waiver Order*").

Qwest's refusal to pay refunds, it will subvert the FCC's requirement that Qwest reduce PAL rates according to the NST before Qwest collected DAC.

Qwest's affirmative defenses<sup>4</sup> against paying refunds are likewise meritless. For the most part, they are based on state law doctrines that are pre-empted by Federal law. Additionally, they are based on a mischaracterization of NPCC's claims and on omission of material facts. They merely serve to illustrate Qwest's desperation to continue to evade and delay full compliance with Federal law.

Qwest has collected DAC for nearly eight years without complying with the NST and without paying refunds. It is time for the OPUC to force Qwest to comply with the FCC's orders and fulfill its agreement to pay refunds.

## **DISCUSSION**

### **I. BACKGROUND**

#### **A. To Ensure Qwest Ended Its Discrimination Against NPCC Members As Required By 47 U.S.C. § 276, The FCC Prohibited Qwest From Collecting DAC Until Qwest Complied With The NST.**

Section 276 of the Telecommunications Act of 1996 ("Act") required RBOCs like Qwest to end their discrimination against competitive payphone service providers ("PSPs") like NPCC's members. The FCC imposed the NST for pricing state payphone services tariffs<sup>5</sup> as the way to implement that Congressional directive. *Reconsideration Order* at ¶ 163. NPCC's Motion for Summary Judgment ("NPCC Motion") explained how and why the FCC prohibited

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<sup>4</sup> Although Qwest has not yet filed an answer to the complaint, its filed rate, statute of limitations, res judicata, and standing arguments are in the nature of affirmative defenses.

<sup>5</sup> NPCC provides the following clarification of footnote 2 in its Motion. Footnote 2 stated that NPCC's complaint addressed whether Qwest owed NPCC's members a refund for CustomNet overcharges, but that NPCC was not addressing CustomNet in its motion because there was an issue of fact related to it. Qwest also did not address CustomNet in its cross motion. NPCC's complaint actually does not address CustomNet because the issue of whether Qwest owes refunds for CustomNet is not ripe for determination. The issue will not be ripe until the PUC determines in Docket UT-125 whether CustomNet rates must meet the NST and, if so, what the NST-compliant rate for CustomNet should be. *See NPCC v. PUC*, 100 P.3d at 783.

Qwest from collecting enormous dial around compensation revenues from interexchange carriers (“IXCs”) until Qwest had effective, NST-compliant PAL rates. *Reconsideration Order*<sup>6</sup> at ¶ 131.

The FCC set a deadline of April 15, 1997 for Qwest to comply with the NST. Qwest knew that it could not meet that deadline, so it asked the FCC for a temporary waiver of the prerequisite to file NST-compliant rates before it could collect dial around compensation. *Refund Order* at ¶ 3, n.7. The FCC granted the waiver in exchange for Qwest’s agreement to refund the difference by which its new, NST-compliant rates (when effective) exceeded the old rates. *Refund Order* at ¶ 20. It is undisputed that Qwest relied on the waiver by collecting dial around compensation before complying with the NST. *See* Ex. 5 to Lawrence Reichman Affidavit (“Reichman Affidavit”).

Rather than making a good faith effort to comply with the NST and paying the required refunds, Qwest fought implementation of the NST, first at the FCC<sup>7</sup> and then in the Federal Courts. *See New England Public Comm. Coun. v. F.C.C.*, 334 F.3d 69, 72 (D.C. Cir. 2003), *cert. denied*, *North Carolina Payphone Assn.*, 2004 U.S. LEXIS 3066 (U.S. Apr. 26, 2004). As a result, Qwest did not have NST-compliant tariffs in effect in Oregon from 1997 through at least 2003 (“Refund Period”). NPCC’s members purchased PAL services from Qwest at various times during the Refund Period at rates far in excess of the NST limits.

**B. Qwest’s PAL Rates Have Been Interim And Subject To Litigation Continuously From 1996 Until Today.**

Further background on the litigation of Qwest’s PAL rates before the OPUC and the Oregon courts will help the Commission understand why Qwest’s arguments are wrong. Qwest’s PAL rates have been under continuous litigation in the Commission’s general rate

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<sup>6</sup> Note 2, *supra*.

<sup>7</sup> Memorandum Opinion and Order, 17 FCC Rcd. 2,051 at n.1 (2002).

cases<sup>8</sup> from 1995. The NPCC has been active in the OPUC rate cases since before the FCC adopted the NST for PAL rates, having intervened in September of 1996.<sup>9</sup> There are a number of reasons that the resolution of Qwest's PAL rates has taken so long. Most of the delay has had nothing to do with the NPCC or PAL rates. Rather, the PAL rate issues were deferred for years while Qwest, the Commission staff, and others fought over Qwest's revenue requirement in the rate cases.

First, the Commission bifurcated the rate cases into a "revenue requirements" and "rate design" phase. *See* Order, OPUC Docket No. UT-125, Order No. 97-171 at 1 (May 18, 1997). It did so that it could conclude two costing dockets before establishing a rate design. *Id.* Indeed, the costing data developed in those dockets ultimately became the basis for determining the direct costs of PAL service later in the rate case. *See* Order, OPUC Docket No. UT-125, Order No. 01-810 at 1 (Sept. 14, 2001) ("Order No. 01-810). After the revenue requirement was determined, Qwest embarked on a lengthy appeal. Ultimately the appeal and related appeals were settled,<sup>10</sup> in early 2000. *See* Order, OPUC Docket No. UT-125, Order No. 00-190 at 1-2 (Apr. 14, 2001). The settlement had two impacts on NPCC members. First, there was a partial refund of PAL rates (under state law, not pursuant to federal law and the *Refund Order*).<sup>11</sup> *Id.* Second, there was a temporary bill credit to PAL rates of \$6.68 per month—in effect a rate decrease to about \$28<sup>12</sup> (also under state law and not federal law). *Id.* at Ex. B, p. 1. Although

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<sup>8</sup> Principally, consolidated Docket No. UT 125/UT 80, though an AFOR docket, costing dockets, and other cases also came into play.

<sup>9</sup> *See* Northwest Payphone Association's Petition to Intervene, Docket UT-125 (Sept. 13, 1996).

<sup>10</sup> Not by NPCC, but by other parties.

<sup>11</sup> NPCC will not dispute that the refunds calculated under the FCC's *Refund Order* should be reduced by the amounts of the partial refunds received pursuant to this settlement. That is an issue for another day, however, since it goes to damages. Only the issue of liability is the subject of the pending motions.

<sup>12</sup> All rate discussions by NPCC are based on the Zone 1 flat rate, except for the measured rate example covering the time period when Qwest did not offer a flat PAL rate. Qwest had several other rate plans and zones, but most payphones were subject to this rate after 1997.

there was absolutely no consideration of the NST in the Commission's 2000 orders, it did result in a PAL rate reduction, the first to occur in the rate cases.

After the 2000 settlement, the Commission took testimony and held hearings on the remaining rate design issues in the rate cases. For the first time ever in any OPUC docket, Qwest addressed whether its PAL rates complied with the NST. *See* Qwest Memorandum. The NPCC participated actively in the rate design phase, presenting testimony and briefing arguing that Qwest's PAL rates did not comply with the NST. In September, 2001, the Commission issued an order that approved a PAL rate of \$26.40 as being NST-compliant. *See* Order No. 01-810 at 48, n.19 and 55. While this rate was substantially below Qwest's existing (as of April 15, 1997) PAL rates, the NPCC believed that Qwest had misled the Commission on Federal law and that PAL rates should have been set much lower than \$26.40. Accordingly, the NPCC appealed that order. In 2003, while the appeal was pending, Qwest slashed its PAL rate to under \$10,<sup>13</sup> apparently in response to its arguments on how to apply the NST being rejected, once and for all, by the federal courts. *See New England Public Comm. Coun. v. F.C.C.*, 334 F.3d 69, 72 (D.C. Cir. 2003). NPCC's Oregon appeal was upheld on November 10, 2004. *Northwest Public Comm's Council v. PUC*, 196 Or. App. 94, 100 P.3d 776 (2004). Remand to the PUC should occur shortly.

## **II. QWEST IS LIABLE FOR REFUNDS TO NPCC'S MEMBERS BECAUSE QWEST RELIED ON THE FCC'S *REFUND ORDER* AS A MATTER OF LAW.**

Qwest claims that it owes no refunds because Qwest never filed new tariffs in response to the *Refund Order*, so it never relied on that order. Qwest Memorandum at 12, 13. Whether Qwest filed new tariffs is not a material fact under federal law. The only fact relevant to whether Qwest relied on the *Refund Order* is whether Qwest began to collect DAC on

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<sup>13</sup> NPCC does not rely on the current PAL rate to establish its refund claim. Rather, the refund claim will need to be based on the PAL rate approved by the PUC on remand. Given the clear guidance from the Oregon Court of Appeals, that should prove relatively straightforward.

April 15, 1997 before complying with the NST. Qwest could not lawfully have done so without the waiver.

Qwest does not dispute the fact that it collected DAC starting on April 15, 1997. Nor can Qwest dispute the fact that its PAL rates did not comply with the NST on April 15, 1997. That fact was conclusively established when the OPUC lowered Qwest's PAL rate substantially in 2001 and when the Oregon Court of Appeals recently held that Qwest failed to follow Federal Law in attempting to justify its PAL rates since entry of the *Payphone Orders*. See *Northwest Public Comm's Council v. PUC*, 196 Or. App. 94, 100 P.3d 776 (2004).

To expose Qwest's distortion of the *Refund Order*, NPCC first explains below the relationship between dial around compensation, the NST and the *Refund Order*.

**A. The FCC Prohibited Qwest From Collecting DAC Before Complying With The NST.**

The reason that Qwest wanted the *Refund Order* is because the FCC prohibited Qwest from collecting dial around compensation unless Qwest had NST-compliant rates effective by April 15, 1997. Qwest's entitlement to DAC originated in the 1996 Telecommunications Act ("Act"). The Act directed the FCC to "establish a per call [dial-around] compensation [(DAC)] plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ." 47 U.S.C. 276(b)(1)(A). Payphone service providers collect DAC from interexchange carriers. RBOCs like Qwest eagerly anticipated the collection of DAC revenues, which were worth hundreds of millions of dollars.<sup>14</sup>

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<sup>14</sup> Though the exact amount is not material, the Commission may be interested to know that DAC payments received have been estimated to be 10 to 20 times the amount of PAL reductions that were required under the NST, depending on the RBOC and the state in question.

The downside for Qwest was that the Act also required RBOCs to reduce PSPs rates for payphone services to cost-based according to the “new services test” (“NST”).<sup>15</sup> The FCC order implementing the Act stated that under the NST, RBOC rates must be “set at the direct costs of providing the service element, plus an appropriate level of overhead costs.” *New England Public Comm. Coun. v. F.C.C.*, 334 F.3d 69, 72 (D.C. Cir. 2003). By requiring RBOCs to set their rates according to the NST, Congress and the FCC expected payphone services rates to decline substantially, which would spur payphone deployment and competition. *See* 47 U.S.C. § 276(b)(1)

The FCC knew that RBOCs were salivating over potential DAC revenues but had no motivation to reduce their payphone rates under the NST. To incent RBOCs to comply with the NST, the FCC ordered in 1997 that RBOCs could not collect DAC until they could certify that they had complied with Section 276, including the NST:

[RBOCs] will be eligible for [dial around] compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276 . . .

*Reconsideration Order* at ¶¶ 131, 163 and n.492 (1997).<sup>16</sup> The FCC directed state commissions to determine whether RBOC rates met the new services test. *Id.* at ¶ 163. The FCC required Qwest to file its new NST-compliant payphone tariffs and supporting cost data by January 15, 1997, to be effective by April 15, 1997. *Id.* Qwest would be unable to collect DAC if it could not meet this deadline.

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<sup>15</sup> Section 276 requires “nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding.” 47 U.S.C. § 276 (b)(1)(C). Those “nonstructural safeguards” are the new services test.

<sup>16</sup> NPCC replaced “LEC” with “RBOC” because in 2002 the FCC limited application of the NST to RBOCs.

**B. Qwest Sought And Obtained An Order From The FCC Allowing Qwest To Collect DAC Before It Met The NST Requirements.**

Qwest was concerned that it would lose its right to collect DAC because it could not comply with the NST by April 15, 1997. Qwest's fears were well-grounded, because none of Qwest's existing PAL tariffs had ever been reviewed or approved by a state commission as complying with the NST, as Qwest admitted to the FCC on April 10, 1997:

[N]one of [the RBOCs] understood the payphone orders to require existing, previously tariffed intrastate payphone services, such as the COCOT [PAL] line, to meet the Commission's 'new services test.' It was our good faith belief that the 'new services test' only applied to new services tariffed at the federal level. It was not until the Bureau issued its 'Clarification of State Tariffing Requirements' as part of its Order of April 4, 1997, that we learned otherwise.

Letter from Michael Kellogg to Mary Beth Richards, April 10, 1997 at 1 ("RBOC Coalition Letter").<sup>17</sup> Qwest had also never filed the NST cost studies that the FCC required as a prerequisite to state commission review and approval of the PAL rates. *See* 47 C.F.R. § 61.49(f)(2).

To become eligible for DAC on April 15, 1997, Qwest, as a member of the RBOC Coalition, sent the RBOC Coalition Letter to the FCC requesting a 45-day waiver of the requirement to meet the NST before collecting DAC. But Qwest recognized that if it received a waiver from the NST requirements, it would disrupt the FCC's plan to have all the requirements of its Payphone Orders become effective by April 15, 1997. Therefore, in the RBOC Coalition Letter, Qwest "voluntarily 'committ[ed]' to reimburse or provide credit to those purchasing the services back to April 15, 1997 . . . 'to the extent that the new tariff rates are lower than the existing ones'." *Refund Order* at ¶ 14.

The RBOC Coalition Letter added that Qwest waived its right to claim that the filed-rate doctrine prohibited refunds:

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<sup>17</sup> Ex. 1 to Reichman Affidavit.

. . . [T]he filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we [the RBOCs] can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.

RBOC Coalition Letter at 2. Qwest would pay the refund “[o]nce the new state tariffs go into effect. . . .” *Id.* at 2. Qwest left the refund obligation open-ended because the state commissions could take months or *years* to conclude their review of Qwest’s revised NST-compliant PAL tariffs.<sup>18</sup> The Oregon experience is a good illustration of how many years the state process can take—currently eight and still counting.

**C. The Refund Order Allowed Qwest To Collect DAC Before It Met The NST Requirements, Only On The Condition That Qwest Refund Any Overcharges Back To PSPs**

The FCC granted Qwest’s waiver request on April 15, 1997. *Refund Order* at ¶ 1. The FCC gave Qwest a partially-retroactive 45 day waiver of time to file NST-compliant tariffs, from April 4, 1997 to May 19, 1997, which allowed Qwest to collect DAC temporarily even though Qwest had not complied with the NST:

In this Order, the Bureau grants a limited waiver of the Commission’s requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the “new services” test, as set forth in the Payphone Reclassification Proceeding. . . . LECs must comply with this requirement, among others, before they are eligible to receive the [dial around] compensation from IXC’s that is mandated in that proceeding.

Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission’s guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the “new services” test of the federal guidelines required by the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in

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<sup>18</sup> “Unlike with federal tariffs, there is of course no guarantee that the States will act within 15 days on these new tariff filings . . . .” *Id.* at 2.

place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective.

*Refund Order* at ¶ 25 (emphasis added). Qwest's waiver came with a burden, which was that Qwest would have to refund to PSPs the amount by which its old, non-NST compliant rates exceeded the new, effective NST-compliant rates, once those became effective:

A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

*Refund Order* at ¶ 2 (emphasis added). Qwest voluntarily assumed that burden in the RBOC Coalition Letter. Although the refund has become a large number over the years, the burden is actually slight. The cost of the refunds is exactly equal to the amount of rate reductions that Qwest was supposed to have put in place on April 15, 1997. Moreover, the benefits of the DAC that Qwest was able to collect likely outweigh the burden by 10 to 20 times.<sup>19</sup>

The FCC did not place a time limit on Qwest's liability for refunds. The *Refund Order* simply stated that Qwest owes a refund for the difference between its non-NST-compliant payphone rates as of April 15, 1997 and its NST-compliant rates "when effective." The 45 day limit only applies to Qwest's duty to file NST-compliant tariffs, which would subsequently be subject to lengthy state commission review, not to Qwest's refund liability.

The FCC's April 15<sup>th</sup> *Refund Order* clarified that, in the absence of a waiver, Qwest could not collect DAC unless it complied with the NST:

In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128. Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive

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<sup>19</sup> See Note 14, *infra*.

the [dial around] compensation from interexchange carriers (“IXCs”) that is mandated in that proceeding.

\* \* \*

In the recent Bureau *Refund Order*, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs’ payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost based, consistent with Section 276, nondiscriminatory and consistent with Computer III [new services test] tariffing guidelines; . . .

*Refund Order* at ¶¶ 1, 10 (emphasis added). Thus, the FCC expected Qwest to comply with the NST and pay refunds, even if compliance were after the waiver period ended.

In sum, any RBOC that accepted dial around compensation without complying with the NST by April 15, 1997 did so in reliance on the waiver granted in the *Refund Order*. Otherwise, its collection of dial around compensation would violate the FCC’s regulations as well as the underlying statute requiring an end to RBOC discrimination, Section 276 of the Act.

**D. Qwest Relied On The *Refund Order* By Collecting DAC Before Complying With The NST**

It is beyond dispute that Qwest began to collect DAC effective on April 15, 1997. The evidence is Qwest’s own Self-Certification Letter it sent on May 20, 1997 to the FCC and the utility commissions in states where Qwest operated.<sup>20</sup> The Self-Certification Letter claims that Qwest was “eligible to receive flat rate interim compensation and per call compensation [DAC] from carriers as of April 15, 1997. . . .” *Id.* Qwest has accepted DAC from IXCs from that date to the present.

Moreover, Qwest does not dispute that it had not complied with the NST by the time it accepted DAC. *See* Qwest Memorandum. Qwest cannot dispute this fact. Qwest admitted in its April 10, 1997 letter to the FCC that it had never calculated its payphone services

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<sup>20</sup> Ex. 5 to Reichman Affidavit.

rates according to the NST (RBOC Coalition Letter at 1, *see supra*), and it did not have an NST-compliant payphone tariff on file effective as of April 15, 1997. Under the Court of Appeals decision, Qwest does not even have a NST-compliant payphone tariff in effect today. *See Northwest Pub. Comm's, supra*, 100 P.3d at 778.

There presently is no valid order holding that Qwest's Oregon rates meet the NST. Qwest made no effort to comply with the NST until 2000, and for the entire Refund Period Qwest charged NPCC's members rates that were put in place using state rate-setting rules that Congress and the FCC had expressly pre-empted. *Id.* at 778.

Because Qwest collected dial around compensation in reliance on the *Refund Order*, Qwest has to pay the refunds required by the *Refund Order*. Qwest cannot have accepted the benefits of the *Refund Order* and then reject the burdens.

**E. Qwest Never Complied With Its NST Obligations Nor Paid Refunds To NPCC Members And Instead Fought Implementation Of The NST.**

Qwest does not dispute that it has never paid a refund to the PSPs under the *Refund Order*<sup>21</sup> during the Refund Period. Instead, Qwest fought implementation of the NST. During that time, Qwest refused to back up its "existing" (1997) PAL rates with the required cost studies and circumvented the NST's requirements by including prohibited costs such as "market-driven return" in its rates. *See Northwest Public Comm's v. PUC, supra*, 100 P.3d at 782. Qwest definitively lost its battles over NST implementation when the D.C. Circuit Court held that the FCC's NST requirements applied to all RBOCs, including Qwest. *See New England Public Comm. Coun.*, 334 F.3d at 72-74; cert denied. Soon after Qwest exhausted its appeals in 2003, Qwest filed vastly lowered PAL rates in Oregon.

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<sup>21</sup> Qwest does mention the partial refund under state-law principles. Upon calculation of damages, NPCC agrees that that refund should be a partial offset to the refunds under the FCC's order.

Qwest's decision to fight the NST for over seven years rather than obey it was a voluntary strategic decision. Now that Qwest has exhausted its efforts to avoid compliance with the NST, it must face the consequences of its delay. Upon compliance, Qwest owes refunds.

**F. Qwest's Failure To File Tariffs In Response To The *Refund Order* Does Not Relieve It Of Its Duty To Pay Refunds.**

Qwest's claim that it did not "rely" on the *Refund Order* because it did not file new tariffs (Qwest Memorandum at 14) during the forty-five day waiver period violates the plain language of the FCC orders cited above. As explained above, the only step required for Qwest to rely on the *Refund Order* was for Qwest to collect dial around compensation before having NST-compliant payphone rates effective as of April 15, 1997. Nowhere does the *Refund Order* state that an RBOC could avoid a refund by failing to timely file NST-compliant tariffs.

Qwest's argument distorts both the letter and the purpose of the *Refund Order*. The *Refund Order* did state that RBOCs must file tariffs, but that was simply a statement of the existing law. The *Refund Order* directed RBOCs<sup>22</sup> to file NST-compliant rates within 45 days, according to the FCC's *Payphone Orders*:

Pursuant to the instant Order, LECs must file intrastate tariffs for payphone services, as required by the Payphone Reclassification Proceeding consistent with all the requirements set for in the Order on Reconsideration, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order. Any LEC that files these intrastate tariffs for payphone services within 45 days of the release date of the Bureau Waiver Order will be eligible to receive the payphone compensation provided by the Payphone Reclassification Proceeding as of April 15, 1997, as long as that LEC has complied with all of the other requirements set forth in paragraph 131 (and paragraph 132 for the BOCs) of the Order on Reconsideration, subject to the clarifications and limited waiver in the Bureau Waiver Order. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997.

*Refund Order* at ¶ 19. The FCC expected that the RBOCs would comply with the NST, not ignore it and then fight it. The 45 days did not limit the time that Qwest was required to pay

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<sup>22</sup> The order says "LECs." The FCC later made the NST mandatory only for RBOCs.

refunds, as Qwest argues. It only limited the time that Qwest was allowed to violate the requirement that its PAL rates comply with the NST.

The *Refund Order* made it abundantly clear that the tariffs that pre-existed the NST requirement were at best interim only under both the *Refund Order* and the *Reconsideration Order*: “The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective.” *Refund Order* at ¶ 19 (emphasis added). The waiver allowed Qwest to have interim PAL rates that were not PUC approved, nor even NST-compliant, for an indefinite period of time. But in order to collect DAC under such circumstances, Qwest had to pay refunds to PSPs.

**G. Qwest’s Refusal To Pay Refunds Subverts The FCC’s Intention To Put Parties In The Position They Would Have Been, Had Qwest Filed NST-Compliant Rates Effective As Of April 15, 1997.**

The FCC and Congress intended to have simultaneous implementation of the NST and DAC requirements. Congress enacted Section 276 of the Act not to give RBOCs a windfall, but to “promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public.” 47 U.S.C. § 276(b). To advance these pro-competitive statutory goals, Congress directed the Commission to “terminat[e] the current system of payphone regulation” and “eliminate all discrimination between [Bell Operating Companies] and independent payphones and all subsidies or cost recovery for BOC payphones.” *Id.* Section 276(a) specifically prohibits any RBOC from subsidizing preferring or discriminating “in favor of its payphone service” after “the effective date of rules prescribed” in the Act. 47 U.S.C. § 276(a). That effective date was April 15, 1997.

The FCC’s payphone orders, including the *Refund Order*, were intended to implement this Congressional purpose. The FCC wanted to “be cautious [when implementing the Act] . . . to ensure that LECs comply with the requirements we set forth in the Report and Order” because the FCC knew that RBOCs would resist implementation of the NST. The FCC determined that the best way to implement these requirements was to require RBOCs to comply

with the NST before collecting DAC, which was supposed to ensure that the NST would be in effect on April 15, 1997. The FCC expected that the promise of DAC would motivate RBOCs to comply with the NST.<sup>23</sup>

Qwest's attempt to accept the benefits of the FCC's *Refund Order* (by collecting DAC before complying with the new services test) while avoiding its burdens (paying refunds for overcharges) undermines the FCC's goals and Congress' mandate. Under Qwest's reasoning, an RBOC that *refused* to file at all under the NST *should not be liable* for refunds whereas an RBOC that timely *complied* with its filing obligations but did not meet the NST standards *would be liable* for refunds. Qwest's theory of the *Refund Order* would reward scofflaws and punish those RBOCs who obey the law.

The absurdity of Qwest's theory is well illustrated by the Bell South cases that both NPCC and Qwest cite. Bell South filed its certificates of compliance with the states on the last day of the 45 days from April 4<sup>th</sup> – May 19, 1997.<sup>24</sup> Qwest filed its certificate of compliance with the states one day later – on May 20, 1997. Self Certification Letter.<sup>25</sup> According to Qwest, Bell South had to pay refunds and Qwest does not because of this one-day difference in when they filed. No FCC language nor any language from the Act that support that absurd result—only Qwest's twisted logic.

The purpose of the *Refund Order* was not to reward recalcitrant RBOCs that ignored their obligations. The purpose of the *Refund Order* was to assure that PSPs would not be harmed or prejudiced by any delay in the filing of necessary replacement tariffs, which purpose Qwest assured the FCC would be achieved if the waiver were granted:

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<sup>23</sup> The amount of DAC collected by the RBOCs is estimated to be 10 to 20 times the cost to the RBOCs of NST compliance.

<sup>24</sup> See cases discussed in Section III, below.

<sup>25</sup> Ex. 5 to Reichman Affidavit.

And competing PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above – which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up – will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

RBOC Coalition Letter at 3 (emphasis added).

Qwest thus enticed the FCC to provide the waiver by saying that Qwest would respect the requirements of Section 276 and the FCC’s regulations. Now Qwest wants the OPUC to ignore the part of the deal that was to protect Qwest’s competitors. But the OPUC cannot disregard federal law. The OPUC would undercut the FCC’s regulations and the law they implement by holding that Qwest’s flagrant disregard for the FCC’s requirements now protects Qwest from making any refunds.

**H. Qwest’s Self-Certification Letter Is Irrelevant As To Whether It Relied On The Refund Order.**

1. In order to rely on its existing PAL rates, Qwest was required to seek OPUC approval of those rates and support them with NST cost studies.

When it came to reducing PAL rates to comply with the NST, the FCC did not leave the fox guarding the henhouse. To the contrary, the FCC delegated that responsibility to the state commissions, here the OPUC. The FCC repeatedly made it clear that determination of compliance was delegated to state commissions, not the RBOCs themselves. For example, in the *Reconsideration Order*, the FCC stated:

Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the Report and Order, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the Report and Order as revised herein; and 2) that in such case no further filings are required.

*Id.* at ¶ 163 (emphasis added). Qwest conveniently omits the bolded text from its brief.<sup>26</sup> The FCC delegated to the “states” – not the RBOCs – the responsibility of determining whether existing PAL rates complied with the NST. Moreover, the states were not to do so based on

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<sup>26</sup> Qwest Memorandum at 6.

merely as self-serving self-certification by an RBOC. Rather, they had to “conside[r] the requirements of the [*Reconsideration Order*] . . . and Section 276.” *Id.* at ¶ 163

The only way the PUC could undertake the “consideration” of Qwest’s existing PAL rates as the FCC required would have been if Qwest had filed the required NST cost studies.<sup>27</sup> But it is undisputed that Qwest did not file any cost studies to support Basic PAL rates with the OPUC before April 15, 1997, nor during the period from then until May 19, 1997, nor even during the rate cases.<sup>28</sup> Indeed the only thing Qwest filed regarding PAL rates in 1997 was with respect to Smart PAL rates, filed in January 1997. *See* Exs. 3 and 4 to Reichman Affidavit and 1 and 2 to Harris Affidavit. The PUC approved the Smart PAL rates – which are not at issue in this case – on April 1, 1997, without addressing the existing Basic PAL rates at all. *E.g.*, Qwest Memorandum at 11-12. Thus, the only filings or proceedings at the PUC to address any PAL rates in 1997 ***occurred and concluded before Qwest even realized that its existing PAL tariffs were required to comply with the NST.***

Qwest bore the burden of affirmatively demonstrating to the Commission that its existing PAL rates met the NST in 1997. *See, e.g.*, ¶¶ 57, 58 (quoted with approval, *Northwest Public Comm’s Council, supra*, 100 P.3d at 781). It is undisputed that the OPUC never reviewed or approved of Qwest’s existing Basic PAL rates until 2000 and 2001. Because Qwest failed to even file the required cost studies in 1997, let alone meet its burden of proof, the Commission should conclude that as a matter of law Qwest relied on the waiver in the *Refund Order*.

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<sup>27</sup> The FCC reiterated the cost study filing requirement in the *Refund Order*: “The RBOC Coalition concedes that the Commission’s payphone orders, as clarified by the Bureau Waiver Order, mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that the requisite cost-support data must be submitted to the individual states.” *Id.* at ¶ 18 (emphasis added).

<sup>28</sup> As the Court of Appeals just held, Qwest’s cost studies that were filed in the rate design phase after the 2000 settlement did not comply with the NST. *Northwest Public Comm’s Council v. PUC*, 196 Or. App. 94, 100 P.3d 776 (2004).

2. Qwest's Self-Certification Letter was merely a notification process to trigger payment of DAC to Qwest and had no binding effect on state commissions nor on the NPCC.

Qwest argues that it is exempt from paying refunds of its years of overcharges because it sent the Self-Certification Letter dated May 20, 1997 to the FCC and state commissions. According to Qwest, even though the PUC and the Oregon Court of Appeals have held that Qwest's pre-April 15, 1997 PAL tariffs did not comply with the NST, Qwest need not refund the difference because Qwest recited, "that it has met all the requirements of the FCC to receive [dial around] payphone compensation." Qwest Memorandum at 13 and Self-Certification Letter. Qwest distorts the purpose and significance of the Self-Certification Letter.

Qwest's certification was only adequate for the purpose of triggering collection of DAC, not meeting the NST. The FCC never intended an RBOC certification like the Self-Certification Letter to be a substitute for actual compliance with the NST. To the contrary the FCC stated that only a state commission can determine actual NST compliance:

We emphasize that a LEC's certification letter does not substitute for the LEC's obligation to comply with the requirements as set forth in the Payphone Orders. The Commission consistently has stated that LECs must satisfy the requirements set forth in the Payphone Orders, subject to waivers subsequently granted, to be eligible to receive compensation. Determination of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction.

*Bell Atlantic-Delaware v. Frontier Communications Services*, DA 99-1971 at ¶ 28 (FCC Com. Car. Bur., rel. September 24, 1999) (emphasis added) (Ex. 1 to Affidavit of Brooks Harlow ("Harlow Affidavit")); *see Order, In the Matter of Ameritech Illinois, US WEST Communications, et al.*, 14 FCC Rcd. 18643 (1999).

The purpose of a certification was solely for an RBOC to notify long distance carriers that it was requesting to be paid DAC. Once a LEC certified compliance, long distance carriers were not permitted to refuse making DAC payments to them. However, the certification did not preclude state commissions from later finding that the RBOC had not actually complied

with the all of the *Payphone Order*'s requirements. State commissions could and did reject Qwest's Self-Certification Letter.

For example, the Washington Utilities and Transportation Commission held that Qwest and Verizon had failed to remove the subsidies from intrastate access tariffs, rejecting Qwest's argument that the Self-Certification Letter disposed of the matter. *Fifth Order*, 1999 Wash. UTC LEXIS 122 at \*19. After Qwest lost its appeal of this ruling<sup>29</sup> Qwest filed a "compliance" tariff. The WUTC rejected it because Qwest failed to make it retroactive to April 15, 1997. *Sixth Order*, WUTC Docket No. UT-970698 at 1 (March 7, 2002). On May 1, 2002, the WUTC approved Qwest's compliance tariff after Qwest agreed to refund \$5.3 million of access overcharges, including interest at 12%. *Seventh Supplemental Order*, WUTC Docket No. UT-970658 at 2 (May 1, 2002).

What the Self-Certification Letter actually established is that Qwest took advantage of the waiver period by requesting DAC:

[Qwest is] eligible to receive flat rate interim compensation and per call compensation from carriers as of April 15, 1997 in 13 of its 14 states excluding New Mexico].

Self-Certification Letter at 2. When Qwest filed new rates after it relied on the waiver is irrelevant.

### **III. THE STATE COMMISSION ORDERS CITED IN NPCC'S MOTION SUPPORT NPCC'S ANALYSIS, CONTRARY TO QWEST'S CLAIM**

NPCC's motion cited several cases in which state public utility commissions ("PUCs") ordered LECs to pay refunds to payphone service providers for years of overcharges dating back to April 15, 1997. Qwest argues that these cases are distinguishable because Qwest relied on its existing rates in response to the *Refund Order*, whereas the RBOCs in the state cases supposedly filed new rates in response to the *Refund Order*. Qwest Memorandum at 18-19.

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<sup>29</sup> In an unreported decision of the Washington Court of Appeals.

Qwest's argument conflicts with the actual facts in those cases. In truth, the RBOCs in those cases relied on their existing rates, just like Qwest. The state cases directly support NPCC's analysis of federal law and undermine Qwest's analysis.

First, the South Carolina Public Service Commission ("SCPSC") required Bell South to compensate members of the South Carolina Public Communications Association for overcharges based on the *Refund Order* because Bell South's existing tariff rates filed on March 14, 1997 did not comply with the NST:

On May 19, 1997, Bell South filed a petition [not a tariff] requesting a declaratory order from the Commission certifying that Bell South's existing tariff rates [filed on March 14, 1997] for its payphone services comply with the FCC's new services test. Bell South's petition was filed to comply with the FCC regulations promulgated under Section 276 of the 1996 Act. Section 276 of the 1996 Act establishes certain requirements designed to promote competition among payphone service providers ("PSPs") and to promote the widespread deployment of payphone services for the benefit of the general public. By Order No. 97-519, dated June 16, 1997, the Commission declined to certify that Bell South's payphone rates comply with the FCC's new services test. The Commission also reaffirmed that should the Commission determine that the actual rates [for pay telephone services] are lower than those filed that Bell South will be required to refund and provide credit to its payphone customers back to April 15, 1997.

1999 SC PUC LEXIS 3 at \*\*1, 3 (emphasis added). The South Carolina commission incorporated the *Refund Order*'s words nearly verbatim by stating that "Bell South must either reimburse or provide credit to its payphone customers from April 15, 1997, if the rates approved in this proceeding are lower than Bell South's existing tariff rates." *Order* at \*\*6, 7. The SCPSC ultimately determined that Bell South's rates did not comply with the new services test and ordered Bell South to compensate payphone service providers for two years of overpayments:

As to the rates set herein, the Commission also finds that Bell South is required to make refunds or credits as required by Order No. 97-367 [which acknowledged the SCPSC's duty to award refunds under federal law], dated May 2, 1997, and Order No. 97-519, dated June 16, 1997. Bell South is therefore ordered to make refunds or give credits, including appropriate interest at the rate of 18.75% per annum, back to April 15, 1997.

*Id.* at \*36 (emphasis added). The Qwest Memorandum gives the false impression that Bell South filed new rates by May 19, 1997 in reliance on the FCC *Refund Order*. Qwest Memorandum at 19. The first sentence of the SCPSC's order shows that the tariffs at issue were Bell South's existing tariffs filed on March 14, 1997, before Bell South knew they had to comply with the NST.<sup>30</sup>

The Tennessee Regulatory Authority ("TRA") required ILECs to pay members of the Tennessee Payphone Owners Association a refund for overcharges based on the *Refund Order*, because the ILECs' existing tariff rates filed on March 14, 1997 did not comply with the NST. The TRA repeated the FCC *Refund Order*'s requirement that "[a] LEC who seeks to rely on the waiver granted in the instant order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." 2001 Tenn. PUC LEXIS 74 at \*44 (emphasis added). The TRA held that almost all the ILECs at issue relied on the *Refund Order* by relying on their existing, pre-April 15, 1997 tariffs as compliant with the NST:

The LECs in this docket acted pursuant to the waiver. Bell South requested certification of its existing tariff . . . on May 19, 1997. UTSE filed a revised tariff on May 19, 1997. Citizens Telecommunications Company of the Volunteer State L.L.C. filed a revised tariff on April 7, 1997 and Citizens Telecommunications Company of Tennessee filed a revised tariff on March 26, 1997. UTSE and Citizens Tariff each contained effective dates of April 15, 1997.

*Id.* at \*\*44-45. The TRA held that these carriers owed refunds to the PSPs that they had overcharged for the past three and a half years:

In order to fully reimburse all payphone service providers, Bell South Telecommunications, Inc., United Telephone Southeast, Inc., Citizens Telecommunications Company of Tennessee L.L.C., and Citizens Telecommunications of the Volunteer State L.L.C. shall pay to all payphone service providers to the true-up amount plus six percent (6%) interest annually

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<sup>30</sup> "On March 14, 1997, Bell South Telecommunications, Inc. ("Bell South") filed revisions to its General Subscriber Services Tariff ("GSST") and its Access Services Tariff with the Public Service Commission of South Carolina ("Commission")." 1999 SC PUC LEXIS 3.

since April 15, 1997. Such payment shall be made no later than 60 days from December 19, 2000.

*Id.* at \*52 (emphasis in original). The TRA stated it was awarding refunds to prevent the ILECs from unlawfully retaining the amounts they had overcharged the PSPs:

If the LECs do not reimburse the PSPs for the value the LECs received from holding the overpayments for over three years, then the LECs and their payphone operations or affiliates will receive a prospective subsidy and/or preference from PSPs who are owed a full reimbursement pursuant to FCC orders. In other words, the LECs will continue to benefit from overcharging the PSPs.

*Id.* at \*\*47, 48 (emphasis added). The TRA was completing “the obvious intent of the federal scheme to return the refund to the class that ultimately has had to pay it.” *Id.* at 47.

The Kentucky Public Service Commission (“KPSC”) required Bell South, GTE South Inc., and Cincinnati Bell Telephone Company to pay members of the Kentucky Payphone Association a refund for overcharges based on the *Refund Order*, because those carriers’ existing, pre-April 15, 1997 tariffs did not comply with the NST. *Order*, 1999 KY PUC LEXIS 63.<sup>31</sup> The KPSC expressly recognized that the *Refund Order* required refunds:

The FCC’s order in the Payphone Reclassification proceeding dated April 15, 1997 granted a waiver of the FCC’s requirement that effective intrastate tariffs for payphone service be in compliance with the federal guidelines, specifically that the tariffs comply with the “new services test” as set forward by the FCC. CC Docket No. 96-128, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (April 15, 1997). A LEC who seeks to rely on this waiver must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates when effective are lower than the existing tariffed rates. Bell South agreed that if the Commission changed the payphone rates, refunds will be made back to April 15, 1997. The Commission’s order dated April 1997 ruled that payphone tariffs filed in conjunction with this case were approved on an interim basis. This was done in order to meet the April 15, 1997 FCC deadline for effective payphone rates, thereby allowing LECs to participate in the interstate per-call compensation plan for PSPs.

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<sup>31</sup> It is clear that these ILECs filed their tariffs before April 15, 1997, because that was the date that the Kentucky Payphone Association filed a complaint alleging that the ILECs previously-filed rates did not meet the NST.

*Id.* The Commission examined the existing rates of Bell South, GTE South Inc., and Cincinnati Bell Telephone Company and found that these rates *filed before April 15, 1997* exceeded the legal amount. “The Commission has found herein that the cost-based rates are lower than the existing tariff rates and therefore Bell South, CBT, and GTE shall provide credits or refunds back to April 15, 1997.” *Id.* The refund was based on tariffs filed within 30 days of the date of the order, which was January 5, 1999, meaning that the Kentucky PUC was ordering nearly two years worth of refunds payable to the members of the Kentucky Payphone Association.<sup>32</sup> The KPSC later issued an order on February 15, 1999 confirming and reiterating that “the FCC’s order allowed for refunds or credits to be given for rates that are not found to be in compliance with the FCC’s order and the Act,” citing the *Refund Order*. *Order*, 1999 KY PUC LEXIS 64. Qwest tried to distinguish the KPSC’s order by claiming that Bell South conceded that it must pay refunds under the *Refund Order* (Qwest Memorandum at 19), but the KPUC required all the ILECs to pay refunds regardless of whether they conceded that point.

Likewise, the Michigan Public Service Commission (“MPSC”) issued an order on March 16, 2004 ordering Ameritech Michigan (now SBC Michigan) and GTE North Incorporated to pay refunds to members of the Michigan Pay Telephone Association. *Order*, 2004 WL 603837. The MPSC held that:

To the extent that SPC and Verizon have charged IPP [independent payphone service providers] rates in excess of the ceiling imposed by the NST [new services test] when the EUCL charge or EUSLC is taken into consideration, those companies have charged unlawful rates and a refund is due their customers.

*Id.* The Commission rejected the arguments of SPC and Verizon that ordering refunds would violate the Filed Rate Doctrine or the prohibition against retroactive ratemaking. Qwest tried to distinguish this case by alleging that the MPSC issued refunds based on state law, when in fact the Commission stated that “[f]ederal and state authorities required that SPC’s and Verizon’s

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<sup>32</sup> The KPSC in 2003 changed the date of the refunds but still confirmed that the refunds were due. 2003 KY PUC LEXIS 457.

rates comply with the NST no later than April 15, 1997.” *Id.* The MPSC’s reference to state law was merely an observation that it had authority to issue federally-mandated refunds under state law as well as federal law.

The Louisiana Public Service Commission (“LPSC”) approved a stipulation between Bell South and the Louisiana Public Payphone Association that called for Bell South to pay “refunds for the cumulative period from April 15, 1997 through the effective date of the tariffs referenced in Item No. 1 above,” which was sometime after October 3, 2001. *Order*, 2001 La. PUC LEXIS 181 at \*\*3, 4. Although this was a joint stipulation, the LPSC would not have approved it if it were in violation of existing law. Qwest claims that the settlement involved tariffs filed in response to the *Refund Order*, but Bell South was actually relying on “an existing tariff for access line service and smart line service along with cost information for each service” that was filed before issuance of the *Refund Order*. *Id.* at \*1.

Finally, the Pennsylvania Public Service Commission (“PPUC”) approved a Settlement Agreement in which Bell Atlantic-Pennsylvania, Inc. agreed to pay refunds to members of the Central Atlantic Payphone Association (“CAPA”). *See* Ex. 2 to Harlow Affidavit. The Settlement Agreement resolved a complaint by the CAPA that Bell Atlantic-Pennsylvania, Inc.’s rates exceeded allowable limits under the NST. The Settlement Agreement incorporated language stating that Bell Atlantic-Pennsylvania, Inc.’s rates were subject to the NST. Bell Atlantic would not have agreed to refunds and the PPUC would not have approved the agreement if it were contrary to federal law.

In sum, Qwest cannot distinguish the above cases, in which state PUCs awarded refunds, from this case. Qwest’s only support is New York Court of Appeals case, which is an outlier case that misapplies federal law. *In the Matter of Independent Payphone Association of New York v. PSC of New York*, 5 A.D.3d 960 (2004). Moreover, the PSPs in New York have filed a petition with the FCC to pre-empt the New York commission and courts because they are contrary to Section 276 and the *Payphone Orders*. Public Notice, FCC Docket No. 96128,

DA 05-49 (Jan. 7, 2005). The petition is pending comment. *Id.* The OPUC should disregard the New York case and follow the reasoning of the six PUC cases that correctly applied federal law and awarded refunds.

#### **IV. THE FILED TARIFF DOCTRINE DOES NOT BAR NPCC'S CLAIM.**

It is surprising enough that Qwest fails to alert the Commission in its brief that even under state law the rates at issue in UT 80/UT 125 were *interim* and subject to refund from May 1, 1996.<sup>33</sup> It is even more surprising that Qwest continues to ignore the overriding federal pre-emption in this area when, just two months ago, the PUC was reversed in UT 125/UT 80 for following Qwest's arguments to ignore the directives of Congress, the FCC, and Federal courts. *Northwest Public Comm's Council, supra*. Qwest's brief completely ignores the pre-emptive effect of Federal law.

##### **A. Even If Qwest Were Correct Under Oregon Law, Federal Pre-Emption Swept Away Qwest's State Law-Based "Filed Rate" Defenses.**

Where a Federal agency regulates the rates, the filed rate doctrine arises from Federal law.<sup>34</sup> Where a state agency regulates the rates, the filed rate doctrine arises from state law.<sup>35</sup> Thus, under the doctrine, the tariffs may have the force and effect of state or Federal law, depending on where they are filed. Like any state law, state-filed tariffs are subject to Federal preemption. *See, e.g., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999) (acknowledging federal preemption of contrary state regulation due to the 1996 Act); *County of Stanislaus v. Pacific Gas & El. Co.*, 114 F.3d 858, 866 (9<sup>th</sup> Cir. 1997).

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<sup>33</sup> See background discussion, Section I.B, above, and Section IV.B.1, below.

<sup>34</sup> *See, e.g., Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922); *Arizona Grocery v. Atchison, T. & S. F. Ry Co.*, 284 U.S. 370, 390, 52 S. Ct. 183, 186 (1932); *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 128-129, 110 S. Ct. 2759, 2767 (1990); *AT&T v. Central Office Tel. Inc.*, 524 U.S. 214, 221-222 (1998).

<sup>35</sup> *See, e.g., ORS 759.205.*

Specifically in this case, under the Supremacy Clause of the United States Constitution (U.S. Const Art. 6, cl. 2), any legal barriers to challenging Qwest's state tariffs that may have existed under state law were swept away by the FCC under 47 U.S.C. § 276(c). *Louisiana Public Service Com. v. FCC*, 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369, 381-82 (1986) (“[p]reemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law”); *AT&T*, 525 U.S. at 378 n.6 (1996 Act “has taken the regulation of local telecommunications competition away from the states.”).

Pursuant to the express authority in Section 276, in the *Reconsideration Order*, the FCC pre-empted the legal foundation for all of Qwest's existing PAL tariffs by imposing a completely new federal test for developing such tariffs. *Reconsideration Order* at ¶ 163; see also, *Northwest Public Comm's Council, supra*, 100 P.3d at 778. On the effective date of the new federal law, April 15, 1997, Qwest's existing PAL tariffs no longer had the force and effect of state law. That legal status was eliminated because any and all previous orders of state commissions were expressly pre-empted. Qwest's self-serving and unilateral decision to maintain the pre-empted rates as the filed rates during the Refund Period while fighting the FCC's decision does not alter that preemption.

To the extent there was any doubt that the *Reconsideration Order* pre-empted Qwest's state tariffs, the *Refund Order* lays it to rest. In the *Refund Order*, the FCC specifically required Qwest to make refunds of overcharges under Qwest's old state tariffs retroactive to April 15, 1997, notwithstanding any state law-based filed rate doctrines. Thus, the FCC extended its pre-emption of state law to the very circumstances of this case.

**B. Oregon State Law Directly Contradicts Qwest's "Filed Rate" Defenses To NPCC's Claim.**

Assuming, for the sake of argument, that state law had any bearing on this issue at all, Qwest's 1996 PAL rates were merely interim rates and were expressly subject to refund.

Moreover, the Oregon statute upon which Qwest relies does not apply to PAL rates that were approved before the FCC required PAL rates to comply with the NST.

1. The filed rate doctrine did not apply to PAL Rates at issue in UT 125, because they were interim rates only, according to the PUC's own orders.

The NPCC's claim for PAL refunds is based on the FCC's orders entered in late 1996 and early 1997. The FCC delegated the responsibility to set PAL rates to state commissions, such as the PUC. At the time of the FCC's orders, *all* of Qwest's Oregon retail rates, including PAL rates, were already under review in a general rate case, UT 125/UT 80. It is in that general rate case docket that the PUC will ultimately determine what PAL rate complies with the NST.

Qwest commenced the rate cases on December 18, 1995, as required by its then-effective Alternative Form of Regulation ("AFOR") plan. Effective on May 1, 1996, the Commission terminated Qwest's AFOR. Thus, pursuant to Qwest's own stipulation, on May 1, 1996, all of Qwest's then "current rates" rates became "interim rates" . . . and were "subject to refund with interest." OPUC Order No. 96-107. Docket No. UT 80 at 2 (April 24, 1996); *see also*, OPUC Order No. 97-171 at 2 (May 19, 1997). ("As of [May 1, 1996], USWC's rates became interim rates subject to refund."). There is no question that PAL rates were encompassed in these orders, as they were specifically discussed. *E.g., id.* at 115.

Qwest conveniently overlooks true status of Oregon law in its brief. Qwest's PAL rates from May 1, 1996, until new, lawful rates are established were and are interim.<sup>36</sup>

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<sup>36</sup> Qwest may argue that NPCC members already received the refunds contemplated by the orders cited. NPCC acknowledges that Qwest paid what might be characterized as "partial refunds." The refunds ordered and paid under state law do not fully satisfy Qwest's obligations under Federal law. Nevertheless, NPCC agrees that Qwest should be credited with the amounts it has already paid. These partial refunds have no impact on the question of liability, however. They only come into play in calculating damages, or the amount of refunds Qwest still owes. Damage issues are to be addressed later under NPCC's motion.

2. Under the Oregon “filed rate” statute, the PAL rates had not been “approved” so as to preclude retroactive adjustment.

Qwest bases its “filed rate” defense on ORS 759.205 and *Pacific Northwest Bell Tel. Co. v. Eachus*, 135 Or. App. 41, 898 P.2d 774, which states that “rates that have been approved and are in force may be adjusted only pursuant to the process described in the statute.” 135 Or. App. at 779 (emphasis added). It is undisputed that the first hearing conducted on Qwest’s compliance with the requirements of the FCC’s NST occurred in Docket UT 125/UT 80 after 2000. PAL rates set at earlier times for other reasons do not constitute a rate approved by this Commission after a hearing as to NST. Because of pre-emption, Qwest was not only free of any previous OPUC order “approving” PAL rates, it was under specific FCC orders to develop cost-based rates in accordance with the NST.

Rather than seeking PUC approval of its PAL rates as it was required to do, Qwest self-certified that its rates were in compliance with Section 276 of the Act and the NST, without any hearing, on May 20, 1997. Self-Certification Letter at 1-2. Such self certification does not constitute “approval” as used in ORS 759.205. Moreover, after the hearing on rate design was finally held in the rate cases, the OPUC rejected Qwest’s PAL rates of \$60 or more as they existed in 1997<sup>37</sup> and instead ordered a PAL rate of \$26. Thus, on the OPUC’s very first review of Qwest’s PAL rates under the NST, the pre-existing rates not only were not approved, they were rejected. Moreover, the Oregon Court of Appeals has just held that Qwest failed to justify even the \$26 PAL rate properly under the NST.

Oregon’s filed rate doctrine has no application to NPCC’s claim.

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<sup>37</sup> Late in 1997 the prevailing rate became \$34.77 due to Oregon legislation unrelated to the NST. The new Oregon law extended the prohibition on mandatory measured service to PAL rates. *See* Ex. 3 to Harris Affidavit.

**C. Applying The Filed Rate Doctrine Here Perverts Its Very Purpose.**

Courts have consistently limited the scope of the filed tariff doctrine to enforcing the non-discrimination principle. *E.g., Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163; 43 S. Ct. 47; 67 L. Ed. 183 (1922) (holding that “the rate is made for all purposes the legal rate between carrier and shipper . . . to ensure uniformity of rates between customers.”); *City of Lockwood v. Union Electric Co.*, 671 F.2d 1173, 1179 (8<sup>th</sup> Cir. 1982) (same). Since *Keogh*, the filed-rate doctrine has been “vigorously criticized.” *Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 944 (9<sup>th</sup> Cir. 1996). Both judicial and academic considerations of the doctrine have undermined its continuing validity. Thus, the filed-rate doctrine should be narrowly construed and applied because the arguments for the doctrine never “had much to be said for them at the time they were originally made and they are even less sensible today.” *Id.* at 914.

Despite this admonition to construe the filed-rate doctrine narrowly, Qwest urges the PUC to apply it in a wholly novel and unprecedented manner –allowing tariffs filed with a **state** agency to pre-empt a **Federal** agency’s order. The Supremacy Clause (and Congress’ intention in the 1996 Act) compels the exact opposite result. Congress’ explicit command was that the FCC’s payphone orders pre-empt contrary state law, including state tariffs. 47 U.S.C. § 276(c).

Even Qwest acknowledges that the sole purpose of the doctrine is to prevent discrimination. Qwest Memorandum at 21. Yet here, the ***purpose of the refund*** is to eliminate discrimination. The FCC ordered PAL rates to comply with the NST to ensure that PSPs’ paid the same for network access as Qwest’s own payphone division. The FCC was required by Section 276(b)(3) of the Act to impose such a regulation to implement the provision of Section 276(a)(2) that a “Bell operating company . . . shall not prefer or discriminate in favor of its payphone service.” Accordingly, if the PUC were to uphold Qwest’s defense, the perverse

outcome would be that a doctrine intended to prevent discrimination would instead uphold discrimination.

**D. Qwest Waived Its Defenses To A Refund Claim.**

Waiver is the intentional and voluntary relinquishment of a known right. *E.g.*, *Mitchell v. Hughes*, 80 Or. 574, 580-81, 157 Pac. 965 (1916). Here, Qwest intentionally and voluntarily waived whatever right it had to rely on the filed rate doctrine in the RBOC Coalition Letter to the FCC:

Once the new state tariffs go into effect to the extent that the new tariffs rates are lower than the existing ones we will undertake to reimburse or provide credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one . . . in this unique circumstance.).

RBOC Coalition Letter at 2.

Qwest acknowledged the “filed rate doctrine” in its own request for a waiver from the FCC and agreed to a refund requirement notwithstanding the doctrine. RBOC Coalition Letter at 2. Qwest also acknowledged that its obligation to pay refunds could extend well beyond 45 days, as it would take much longer for state commissions actually to review and approve the filings even if they were timely made. RBOC Coalition Letter at 2.

Ordinarily, carriers cannot by agreement escape the operation of the filed rate doctrine. This situation is different, however, because the FCC accepted the waiver and incorporated it into federal law. Since the filed rate doctrine at issue is a state law, the FCC’s incorporation of that waiver trumps the state filed rate doctrine.

**V. THE STATUTE OF LIMITATIONS DOES NOT BAR NPCC’S CLAIM.**

Qwest alleges that the statute of limitations bars NPCC’s claims (Qwest Memorandum at 22), but as with Qwest’s other arguments, the statute of limitations defense is superficial and ultimately erroneous. For example, Qwest argues for the application of a state law “filed rate” doctrine, but inconsistently seizes upon a Federal statute of limitations.

Undoubtedly the Federal statute was the shortest one Qwest could find. Qwest's defense fails regardless of which statute of limitation might apply to NPCC's claim.

**A. The Federal Statute Of Limitations, If It Applies, Has Not Even Accrued Yet.**

Qwest cites only one statute of limitation in its brief, 47 U.S.C. § 415(b). Most of the limitations periods under Section 415 were imported from the Interstate Commerce Act, and apply to damages and overcharge actions before both the FCC and federal courts.<sup>38</sup> *Ward v. Northern Ohio Tel. Co.*, 251 F. Supp. 606, 608-611 (N.D. Ohio 1966), *aff'd per curiam*, 311 F.2d 16 (6<sup>th</sup> Cir. 1967). By the very terms of Section 415(b), the statute does not begin to run until the cause of action "accrues."

"Under federal law a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action." *Alexopoulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 555 (9<sup>th</sup> Cir. 1987); *accord Tworivers v. Lewis*, 174 F.3d 987, 992 (9<sup>th</sup> Cir. 1999) (claim does not accrue until "plaintiff knows or has reason to know of the injury"). Thus, assuming Section 415 applies to this action, the statute of limitations did not or does not begin to run "until the aggrieved person discovers or, by the exercise of due diligence could have discovered, the basis of the cause of action." *Pavlak v. Church*, 727 F.2d 1425, 1428 (9<sup>th</sup> Cir. 1984).

Qwest's statute of limitations argument is based on a misstatement of NPCC's claim. Qwest describes the claim as being one to establish that Qwest's PAL rates effective in April 1997 violated the NST. Qwest Memorandum at 22. To the contrary, as the Complaint in this docket repeatedly makes clear, the NPCC relied on the rate cases (UT 125/UT 80) to establish NST-compliant PAL rates. Had the outcome of the rate cases been the same or higher rates, under the FCC's *Refund Order* Qwest would have had no refund obligation. The rate case

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<sup>38</sup> However, as discussed below, the limitation period for an action at this Commission is governed by state law.

had to be or has to be concluded, at least in part, before Qwest could know it had a refund obligation and before the NPCC knew it had a claim.

Under the *Refund Order*, before a cause of action could exist three facts had to exist and be known to NPCC: (1) Qwest must have effective newly-tariffed NST-compliant PAL rates; (2) those new rates must be lower than the existing (at April 15, 1997) rates; and (3) Qwest did not refund the difference between the new and the old rates. The first prerequisite is arguably still lacking, meaning the cause may not have accrued even today, as the final resolution of Qwest's PAL rates currently awaits action by the PUC after remand from the Court of Appeals.

The first OPUC-ordered PAL rate reduction occurred in the rate cases in 2000, when the Commission approved the settlement that gave PSPs a temporary bill credit. Although there was no discussion of the NST in the Commission's 2000 orders, out of an abundance of caution the NPCC commenced this case in May 2001. The filing was intended to ensure that NPCC's refund claim was brought within two years of the new rates "when effective." Both Qwest and NPCC agreed to stay the case until the rate cases were concluded—a tacit admission that the case was not fully ripe even in 2001. *See Stipulated Motion to Stay Proceeding*, Docket DR 26/UC600 (June 14, 2001).

Far from being too late, NPCC's action was, if anything, premature. The action was certainly timely in that it was brought just one year after the first rate reduction that arguably had anything even remotely to do with the NST.

**B. The PUC Should Apply The Oregon Six Year Statute Of Limitations—Which Also Has Not Accrued—To NPCC's Complaint.**

As noted above, the statute on which Qwest relies, 47 U.S.C. § 415, applies to actions brought before the FCC or Federal courts. This is an action at the Oregon PUC. Qwest merely assumes, without citation to any authority, that the PUC can or must apply Section 415 as

well. Lacking any authority for applying Section 415 in a state PUC action, there is no clearly applicable federal statute of limitations.<sup>39</sup>

The Supreme Court has generally held that, absent a clearly applicable federal statute of limitations, federal courts should determine the most analogous state statute of limitations and incorporate its time limits. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2778 (1991). NPCC has found no specific statute of limitations provisions in the Oregon utility statutes relating to claims for refunds or overcharges. There are a number of general statute limitations, codified at ORS chapter 12. The section that most closely matches NPCC's claim is ORS 12.080, for actions on a contract or liability:

(1) An action upon a contract or liability, express or implied, excepting those mentioned in ORS 12.070, 12.110 and 12.135 and except as otherwise provided in ORS 72.7250;

\* \* \*

shall be commenced within six years.

The NPCC's claim is in the nature of a contract, since it is based on Qwest's promise to pay refunds. Alternatively, it is an express liability – arising from the FCC's *Refund Order* – that is not one of the enumerated exceptions to the six year statute.

Like the Federal statute, the six year state statute does not begin to run until the cause of action has “accrued.” ORS 12.010. There are a number of Oregon cases addressing when a cause of action on a contract accrues. The Oregon Supreme Court noted that “[a]s soon as a party to a contract breaks any promise he has made, he is liable to an action.” *Hollin v. Libby, McNeill & Libby*, 253 Or. 8, 13, 452 P.2d 555, 558 (1969). More recently, the Court of Appeals explained that “[i]f each part performs in accordance with the terms of the contact, neither party has cause to complain. An action on a contract accrues when there is a breach.”

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<sup>39</sup> Moreover, as Qwest notes, the term “overcharges” as defined in Section 415 does not apply to NPCC's claim because the claim is not based on federal tariffs. Qwest Memorandum at 22, note 12.

*Vega v. Farmers Ins. Co.*, 134 Or. App. 372, 375-76, 895 P.2d 337, 340 (1995), *affirmed* by 323 Or. 291, 918 P.2d 95 (1996). Applying these principles, it is easy to see why NPCC's cause of action did not accrue in April 1997 as Qwest asserts. Until the PUC lowered Qwest's existing PAL rates, Qwest had no obligation to pay refunds. Lacking an obligation, Qwest could not be in breach. Lacking a breach or liability by Qwest, NPCC had no claim.

Whether the Federal statute Qwest cites or the six year state statute applies, NPCC's action was timely, because the claim for refunds did not accrue until much later than 1997.

## **VI. RES JUDICATA DOES NOT BAR NPCC'S CLAIM.**

Qwest's res judicata argument is a complete red herring. Qwest fails to advise the Commission of the requirements of a res judicata defense.

Under the doctrine of claim preclusion (also known as *res judicata*), a plaintiff who has prosecuted one action against a defendant to final judgment, and those in "privity with the plaintiff," are barred from prosecuting another action against the same defendant "where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action."

*E.g., Bloomfield v. Weakland*, 193 Or. App. 784, 792, 92 P.3d 749 (Or. App. 2004) (citations omitted).

All of the elements of a res judicata defense are lacking here. NPCC is not a "plaintiff who has prosecuted one action" against Qwest to "final judgment." NPCC was an intervenor, not the complainant in Qwest's rate cases. The issues in Order No. 00-190 were framed by the history of docket UT 125/UT 80 – as well as a number of other related dockets and court cases – and also by the stipulation presented to the Commission that would resolve those numerous cases. NPCC was not a party to the stipulation and had no opportunity to participate in the negotiations leading to it. The case was not "prosecuted to final judgment." NPCC's comments were but one of many in but one of many phases of a docket that is still open.

Finally, and most importantly, the second action is *not* “based on the same factual transaction that was at issue in the first.” The Commission’s refund in its Order No. 00-190 was based on a stipulation of the major parties to Qwest’s rate case and numerous then-pending court appeals. Those appeals involved dozens of complex issues going back for years relating to Qwest’s revenue requirements and conclusion of Qwest’s AFOR. All of those issues involved solely state law rate-making and related regulatory issues. Nothing in the stipulation addressed Section 276 or the FCC’s *Payphone Orders*. Indeed, the stipulation to a partial refund could not address NPCC’s claim for refunds under the FCC’s *Refund Order*.<sup>40</sup> A claim for refunds under the *Refund Order* would not be ripe until the OPUC approved new rates as compliant with the NST. The PUC did not even address NST compliance until late 2001, in Order No. 01-810. Thus, Order No. 00-190 did not address the same facts.

Qwest is wrong in asserting that NPCC “had an opportunity” in Docket UT 125/UT 80 to support the claim it asserts in this docket. As the Commission noted in Order No. 00-190, there was not enough evidence to rule on NPCC’s claim. The reason there was no evidence is that the ruling on the settlement was an interim ruling that addressed limited issues, based on a truncated record, and before the question of compliance with the NST was ever addressed by any party. *Res judicata* cannot apply under such circumstances.<sup>41</sup>

## **VII. THE NPCC HAS STANDING TO SEEK AN ORDER DIRECTING QWEST TO PROVIDE REFUNDS TO PAL SUBSCRIBERS AS FEDERAL LAW REQUIRES.**

Qwest’s defense of lack of standing should be rejected for four reasons. First, NPCC’s standing to bring its complaint is *law of the case*, having already been upheld by the Marion County Circuit Courts. Second, many PUC decisions uphold the right of associations to

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<sup>40</sup> The only impact of the partial refund in UT 125/UT 80 in this case will be on calculation of damages. See Note 36, *supra*.

<sup>41</sup> Nor would Qwest be able to assert a defense based on issue preclusion, which has five elements, most of which are missing here. See, e.g., *Nelson v. Emerald People’s Utility Dist.*, 318 Or. 99, 862 P.2d 1293 (1993).

seek refunds on behalf of their members or constituents. Third, Qwest simply misreads and misapplies the term “reparations” in the statute upon which it relies. In the unlikely event the PUC found that Qwest’s arguments had any merit, the appropriate remedy would be to allow an amendment to add individual company members to join in the complaint, not to dismiss.

**A. It Is Law Of The Case That NPCC Has Standing To Bring This Complaint.**

This case was dismissed by the Commission sua sponte and the NPCC appealed that dismissal to the Marion County Circuit Court. On May 13, 2003, Qwest filed a motion in that court to dismiss NPCC’s appeal based on NPCC’s alleged lack of standing. *See* Ex. 3 to Harlow Affidavit. Qwest made two arguments to the court, both of which were rejected when the court denied Qwest’s motion.<sup>42</sup> Qwest’s first argument dealt with standing to appeal, which has no relevance now. Qwest’s second argument is the very same defense Qwest now asserts in opposition to summary judgment. Qwest asserted that the NPCC did not have standing to bring its complaint before the Commission because “[ORS 756.500] . . . restricts the availability of reparations.” Ex. 3 to Harlow Affidavit at 11. The Circuit Court rejected Qwest’s argument and held that NPCC had standing to pursue remedies for its members. The Circuit Court has thus already disposed of Qwest’s standing argument, and it is a matter of law of the case that the NPCC has standing.

The Commission must defer to the reviewing court’s determination on standing, as it has no jurisdiction to revisit this issue.

**B. The PUC Has Allowed Numerous Complaints For Refunds By Associations In A Representative Capacity.**

There are numerous cases that belie Qwest’s argument that NPCC has no standing to bring this action. NPCC is a regional trade association representing competitive payphone service providers in Oregon, Idaho, Montana, and Washington. NPCC’s Complaint

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<sup>42</sup> The court’s order is attached as Ex. 4 to the Harlow Affidavit.

was brought pursuant to ORS 756.500(1), which allows that “any person” with a grievance against an entity the PUC regulates may file a complaint. The fact that NPCC’s members rather than NPCC itself would receive a refund under the complaint is irrelevant, because “[i]t is not necessary that a complainant have a pecuniary interest in the matter in controversy or in the matter complained of.” ORS 756.500(2).

Consistent with the statute, the PUC has recognized that organizations like NPCC may file complaints seeking refunds for their members pursuant to ORS 756.500(2). *See, e.g., Re PacifiCorp*, No. 01-186, 2001 WL 527428, at \*2 a (Or PUC Feb. 21, 2001) (complaint filed by Citizens’ Utility Board (“CUB”) and Industrial Customers of Northwest Utilities **“preserve[d] customers’ rights to a refund \* \* \*** should the Commission later find the rate increase was not justified”) (emphasis added); *May v. Portland Gen. Elec. Co.*, No. 92-1769, 1992 WL 501195 (Or PUC Dec. 15, 1992); *Citizens Util. Bd. of Or. v. Pacific Northwest Bell Tel. Co.*, No. 91-1013, 1991 WL 504887, at \*1 (Or PUC Aug. 9, 1991) (PUC considered CUB’s complaint, which sought an “order requiring [US West Communications] to compensate pay stations,” on the merits); *Re Pacific Northwest Bell Tel. Co.*, No. 87-406, 1987 WL 257178 (Or PUC Mar. 31, 1987) (after considering a **complaint filed by CUB**, PUC ordered Pacific Northwest Bell Telephone Company to **refund** approximately \$10,300,000 **to customers**).

Like CUB and Industrial Customers of Northwest Utilities, NPCC was organized to represent its members in utility matters, such as seeking rate reductions and – where allowed or required – refunds. Such representational standing has a long history at the PUC.

**C. The Statutory Provision On Which Qwest Relies Applies To Claims For “Reparations,” Which Is Not The Nature Of The NPCC’s Claims.**

Were the Commission to review the court’s determination on standing, it would see that once again Qwest has pinned its arguments on unwarranted assumptions. Specifically, here Qwest equates the term “reparations” in ORS 756.500(2) with the “refunds” of overcharges

that the NPCC seeks for its members. And again, Qwest cites no authority for this definitional slight of hand.

The concept of reparations is addressed in several older Oregon cases. The most recent case is *McPherson v. Pacific Power & Light Co.*, 207 Or. 433, 296 P.2d 932 (1956). It is clear from the discussion in *McPherson* that “reparations” are very different from “refunds” for overcharges. *See Id.* at 296 P.2d at 940-41; *see also, O.W.R. & N C. v. Bean*, 164 Or. 266, 101 P.2d 230 (1940); *Lee Inc. v. Pac. Tel & Tel. Co.*, 154 Or. 272, 275-76, 59 P.2d 683 (1936). Reparations actions involved investigation into the reasonableness of rates previously charged and paid. If the rates paid were found to be unjust and unreasonable, then retroactive reparations could be ordered. In other words, reparations were an adjunct to the ratemaking function.<sup>43</sup>

In contrast to reparations, refunds for overcharges actions seek to recover payments made in excess of an established benchmark. In this case the benchmark was established or will be established in Docket UT 125. The refund claim is not based on state law allowing reparations but, rather, are based on Federal law requiring refunds. The claim for refunds does not involve ratemaking discretion. It merely involves a subtraction of the newly effective rates from the rates paid.

**D. Should The Commission Question NPCC’s Standing In This Docket, The Interests Of Justice Dictate That NPCC Be Given Leave To Amend To Add Members As Complainants Or Its Members Be Allowed To Intervene.**

Nothing in ORS 756.500 even mentions, let alone requires, dismissal of a complaint. It simply prohibits an award of “reparations.” NPCC has requested “refunds” and a declaratory order. In the unlikely event that the Commission agrees with Qwest that ORS 756.500 prevents it from granting any of the relief the NPCC seeks, the simple and just solution

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<sup>43</sup> Indeed, reparations appears to constitute retroactive ratemaking. That may explain why there are no recent cases on reparations, since *true* retroactive ratemaking is not generally permitted under current Oregon law. The reference to “reparations” may be an anachronism. But at the time the term was first included in what is today ORS 756.500, it was a term of art that had a distinct meaning from refunds.

is to give leave to NPCC to amend to substitute members as complainants or for members to intervene. Since there is a remote possibility that statute of limitations could be an issue at this time, it would be inequitable to require NPCC to refile its complaint with the added parties. Moreover, it would be extremely inefficient to start over in a case that is already four years old.

### **CONCLUSION**

The FCC's *Refund Order* was a quid pro quo, where Qwest would receive DAC before it complied with the NST in exchange for paying a refund to PSPs that it had overcharged. Qwest accepted the benefits of the quid pro quo by collecting DAC sometime soon after May 20, 1997, but Qwest failed to accept the burden, which was to have effective, NST-compliant rates on file by May 19, 1997, with an effective date of April 15, 1997. Accordingly, the OPUC must now force Qwest to comply with the FCC's orders by paying a refund to NPCC's members.

DATED this 25<sup>th</sup> day of January, 2005.

MILLER NASH LLP



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Brooks E. Harlow  
OSB No. 03042  
David L. Rice  
Miller Nash LLP  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101-2352  
Telephone: (206) 622-8484

Attorneys for Complainant Northwest  
Public Communications Council